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Letter dated 8 May 2003 from the Secretary-General addressed to the President of the Security Council

I have the honour to refer to my letter of 16 April 2003 (S/2003/431), under cover of which I forwarded for the consideration of the members of the Security Council a letter dated 26 March 2003 from the President of the International Tribunal for Rwanda, Judge Navanethem Pillay. In her letter, President Pillay requested extensions of the terms of office of four non-elected permanent Judges of the International Tribunal for Rwanda in order to allow them to dispose of a number of ongoing cases.

I also have the honour to refer to the letter dated 30 April 2003 (S/2003/550) of the former President of the Security Council, Adolfo Aguilar Zinser, in which he asked me to convey to President Pillay the views of the members of the Security Council on the requests contained in her letter. He also asked me to convey to President Pillay the request of the members of the Security Council for certain information and documentation to assist them in the further consideration of President Pillay's request.

Attached for your consideration and for the consideration of the members of the Security Council is a letter, dated 6 May 2003, which President Pillay has sent to me pursuant to that request (see annex).

I should be most grateful if you could bring the present letter and its annex to the attention of the members of the Security Council.

(*Signed*) Kofi A. Annan

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Annex

Letter dated 6 May 2003 from the President of the International Tribunal for Rwanda addressed to the Secretary-General

I have the honour to refer to the letter dated 30 April 2003 addressed to you by the Security Council and which conveys the views and requirements of members of the Security Council.

I note that the members of the Security Council view the requested extension of Judge Winston Churchill Matanzima Maqutu's term of office until December 2005 as far too long. The Security Council members noted that the precedents to date do not warrant an extension of the term of office beyond one year.[a] I urge the members of the Security Council to make a realistic appraisal of the special circumstances attaching to the Butare Case and treat the requested long extension as an exceptional measure. There is no precedent for a joint case of this magnitude as the Butare Case, of six accused, in either of the ad hoc Tribunals.

[a] It is noted in this context that Judge Cassese, in his letter to the Secretary General of the 18 June 1997 concerning the three ICTY judges' extensions of service, referred to the precedents at the ICJ. Judge Cassese observed: "We have been advised by the Registry of the International Court of Justice that in one case the mandate of an outgoing Judge (Gros) was extended for two years (1982-1984) while in another case (Judge Sette-Camara) it was extended for four years (1988-1992)."

In accordance with Rule 15 *bis* (C) of the Tribunal's Rules of Procedure and Evidence,[b] I sought the consent of the six accused in the Butare Case for the continuation of the trial with a new judge in place of Judge Maqutu. Defence Counsel oppose a continuation of the trial with a replaced judge and give as their reasons that it is not in the interests of justice and that it would violate the right of the accused to a fair trial for a new judge to continue the trial without having heard first-hand the witnesses who have appeared before the Chamber. Defence Counsel further state that such a judge could not assess the key elements of the case from a mere reading of the transcripts and observe that the accused would be additionally prejudiced by a replacement at this stage after three years of pre-trial motions and trial sessions.

I therefore confirm that it would indeed be necessary for the Butare Case to begin *de novo* before a fully reconstituted Chamber if the requested extension is not approved. The financial and practical consequences of the transfer of the Butare Case to a differently constituted Chamber and the implications for the Tribunal's completion strategy are prohibitive.

Status of the Case

1. The Butare Case is the largest joint trial before this Tribunal, involving six Accused persons indicted in four indictments. It started on 12 June 2001, and was heard in parallel with two other cases against two defendants by Trial Chamber II. As of today, 23 witnesses have been heard during 107 trial days and another 67 Prosecution witnesses remain to be called if the present list is maintained.

2. Most of the witnesses have testified against three or more accused. Counsel for each of the six accused has a right to cross-examine a witness whose testimony affects that accused and that explains the overall duration of the testimony of those witnesses. On average, each witness takes 4.33 days. Moreover, the Trial Chamber has already dealt with a very large number of motions filed by the parties at the pre-trial and the trial

b "If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused."

stage. Those decisions and orders have formed the legal basis of the current proceedings and have binding consequences.

3. It is not certain that a newly constituted Bench of Judges would be able to commence the trial again. An application could be brought against the recommencement of the trial on the grounds that to do so would amount to an 'abuse of process'. This might lead to a stay of proceedings and the effective release of the accused. Even if the argument did not succeed, the Defence would be entitled to mount it, not just before the newly constituted Chamber, but before the Appeals Chamber. Considerable time and cost would inevitably be involved simply in rehearsing the arguments and obtaining decisions thereon.

Witnesses and *de novo* trial

4. The effect of a trial *de novo* with respect to witnesses and victims who have already testified extensively before the Tribunal, sometimes after great difficulties, should not be underestimated. If the witnesses who have already testified were to be recalled, their testimony would then be given some two years after having given their testimony on the first occasion, which may have an adverse impact on their recollection of facts. Some of those witnesses may not be in a position to testify again before this Tribunal due to the passage of time. Five of the witnesses on the Prosecution's list of its total number of witnesses have passed away.

5. The Registry's Witness Protection Unit cautions that the likelihood of being able to persuade all twenty three witnesses to return to Arusha to give testimony all over again is very remote. The witnesses themselves are very conscious of the fact, that to be recalled to Arusha would greatly compromise their security, engendering fear in the witnesses. It is very important to recall that, so far, there have been witnesses who are also victims who have had to re-live their own horrific personal trauma.

Length of Provisional Detention of the Accused

6. The accused persons jointly tried in the "Butare Case" were arrested as early as June 1995 (Kanyabashi and Ndayambaje), July 1997 (Nsabimana, Ntahobali, Nyiramasuhuko) and April 1998 (Nteziryayo) and these periods constitute some of the longest periods of pre-trial detention served before this Tribunal.

7. The Trial Chamber has denied several motions for provisional release on the grounds *inter alia* that the trial was either pending or had already started. Commencing the trial *de novo* would inevitably prolong the provisional detention of accused who have been in detention for close on eight years and this would impact the statutory rights of the accused. As mentioned above, the issue of provisional release will very likely be raised again if the proceedings were to be terminated and the trial commenced at a later date.

Financial and Practical Implications on Completion Strategy

8. The financial costs of commencing the case must be seen in terms of the trial progress since June 2001 (in parallel with other cases, see above) and the repetition of this work from the date the trial restarts. The issue of separation of the joint trial into single cases may be raised again. The prospective date for the end of the case would have to be revised and will result in an extension of the completion strategy of the Tribunal. As of today, 31 detainees are awaiting trial. If the trial were to start de *novo*, it would add another 6 detainees to the overall workload of the Tribunal, which is almost a 20% increase. The work of the Trial Chamber during 107 trial days would be lost.

9. The Tribunal has carefully planned the trials that will start early in its third mandate. A recommencement of the Butare trial will seriously disrupt the Tribunal's planning and represent a serious set-back in its activities.

10. As all six of the accused in this case are indigent and the issues involved are complex the legal costs and reimbursements incurred so far have been very high. The Defence teams comprise 12 counsel, 12 investigators and 6 legal assistants and the total costs expended on the teams from June 1995 to date are US$8,388,000.00, of which US$3,918,000 has been paid for their work in the trial proceedings. The Witness

Protection Section has spent US$62,593.00 in securing the attendance of the 23 Prosecution witnesses who have testified.

11. It is noted that the total direct and indirect costs of holding court sessions in one of the three Chambers is necessarily very high and represents a considerable proportion of the Tribunal's resources. While it is difficult to make an exact estimate of the total costs relating to the court sessions (judges, court, security and other support staff and material resources) that would be lost, it is likely that it would be a considerable portion of the annual budget. If the Trial recommences, the total costs of conducting the trial so far will be incurred again.

12. The practical consequences have to be seen in terms of the rights of the accused in view of the length of the proceedings (two years could be considered wasted by the accused persons), the procedural difficulties arising from a part-heard case, and the incidence of having a significant number of witnesses recalled and lost to the parties.

13. The prosecution of the six accused has been proceeding since June 1995 and the possible adverse effect of a decision to recommence such an important trial on the goals of national reconciliation in Rwanda should not be underestimated by the international community. The interests of justice are clearly best served if those proceedings are allowed to continue uninterrupted.

14. With regard to the requested extension of Judge Pillay's term of office, as requested, an undertaking by her is annexed.

(*Signed*) Judge Navanethem Pillay
President